No. 87-549

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF EVANSTON, ET AL., PETITIONERS

v.

REGIONAL TRANSPORTATION AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly dismissed petitioners' complaint for lack of standing.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-11a) is reported at 825 F.2d 1121.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1987. The petition for a writ of certiorari was filed on October 3, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action concerns a tract of land in the City of Evanston, Illinois, which respondent Regional Transportation Authority purchased from respondent National Steel Service Center, Inc., for use as a bus maintenance facility. The purchase and conversion of the tract is being funded, in part, with federal funds provided by respondent Urban Mass Transportation Administration (UMTA)

of the United States Department of Transportation.[1] Petitioners alleged that the purchase and operation of the tract as a bus maintenance facility would violate the Urban Mass Transportation Act of 1964, 49 U.S.C. App. (& Supp. III) 1601 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. III) 4321 *et seq.* Pet. App. 1a-2a. The district court dismissed the complaint for lack of standing and because it found that the statutes petitioners sought to invoke do not create a private right of action (*id.* at 12a-13a). The court of appeals affirmed (*id.* at 1a-11a).

1. The Urban Mass Transportation Act (UMT Act) authorizes the Secretary of Transportation to make grants or loans to assist states and local public bodies and agencies in financing the planning, development, construction and improvement of mass transportation projects. Prior to approving funds for a project, the Secretary must be satisfied that various requirements set forth in the UMT Act have been met. The applicability of the various statutory requirements depends upon the section of the UMT Act under which financial assistance is sought. The Secretary of Transportation administers this grant and loan program through UMTA. See generally *Rapid Transit Advocates, Inc.* v. *Southern Cal. Rapid Transit Dist.*, 752 F.2d 373, 375-376 (9th Cir. 1985).

UMTA, as are other federal agencies, is also bound by the requirements of the National Environmental Policy Act of 1969 (NEPA). Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), provides that all federal agencies shall "include in every recommendation or report on proposals

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[1] Following the initiation of this suit, UMTA provided federal funding for the purchase of the tract and the tract was conveyed to the Regional Transportation Authority. UMTA has not yet provided funding to complete the conversion of the existing structure.

for legislation and other major Federal actions significantly affecting the quality of the human environment" a detailed statement (customarily referred to as an "Environmental Impact Statement" or "EIS") concerning the environmental impact of the proposed action and related matters. An EIS need not be prepared where the proposed action will not "significantly" affect the quality of the human environment.

The Council on Environmental Quality (CEQ) has promulgated regulations governing agency compliance with NEPA, including the establishment of uniform procedures for all federal agencies to follow in determining whether, when, and how to prepare an EIS. 40 C.F.R. Pt. 1500. These regulations also direct that each federal agency adopt its own procedures, as necessary, to supplement the CEQ procedures. 40 C.F.R. 1507.3(a). In response to this directive, UMTA and the Federal Highway Administration have promulgated regulations at 23 C.F.R. Pt. 771 for implementing NEPA and the core CEQ procedures.

Section 1507.3(b) of the CEQ regulations (40 C.F.R. 1507.3(b)) requires that the procedures adopted by the agencies include specific criteria for, and identification of, three classes of action. Class I projects include actions that may significantly affect the environment and thus require an EIS. Class II projects, termed "categorical exclusions," include actions that do not normally have a significant effect on the environment and thus would not require an EIS. Class III projects are those in which the environmental impacts cannot be initially determined. For Class III projects, the agencies have to prepare an environmental assessment to determine whether an EIS is required.[2]

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[2] An "environmental assessment" is a public document setting forth concisely the evidence and analysis that leads an agency to conclude that a given action will or will not have a "significant impact" so as to require a full EIS. 40 C.F.R 1508.9.

Consistent with CEQ's classification procedures, UMTA's regulations enumerate 29 categorical exclusions. 23 C.F.R. 771.115(b)(1)-(29). Categorical exclusions are defined in 23 C.F.R. 771.117 as "categories of actions which do not involve significant environmental impacts or substantial planning, time or resources. These actions will not induce significant foreseeable alterations in land use, planned growth, development patterns, or natural or cultural resources." Categorical exclusions include (23 C.F.R. 771.115(b)(25)):

> Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.

2. The City of Evanston, its mayor, and two aldermen commenced this action by filing a complaint (Pet. App. 14a-29a) alleging that respondent Suburban Bus Division (PACE), a division of the Regional Transportation Authority (RTA),[3] was planning to purchase a tract of land in Evanston from respondent National Steel Service Center, Inc., and thereafter convert the property for use as a bus maintenance facility. The complaint further alleged that this purchase and conversion was being funded in part with federal funds from UMTA, which was named as a defendant along with the United States Department of Transportation, PACE, RTA, and National Steel (*id.* at 16a).

The complaint contained three counts. Count I (Pet. App. 27a) alleged that the proposed sale of the tract from

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[3] RTA is a municipal corporation organized and operating pursuant to the provisions of the Regional Transportation Authority Act, Ill. Ann. Stat. ch. 111 2/3, paras. 701.01 *et seq.* (Smith-Hurd Supp. 1987), for the purpose of providing aid and assistance for public transportation in northeastern Illinois.

National Steel to PACE was "unreasonable, invalid and void and against public policy" because PACE had agreed to a purchase price more than $1 million over the fair market value of the tract, as estimated by petitioners. Count I also alleged that the Agreement of Sale (*id.* at 37a-44a) was invalid because it had not been approved by PACE's Board of Directors.

Count II (Pet. App. 27a) asserted that the proposed sale was null and void because no proper notice had been given for public hearings on the proposed acquisition and "the City of Evanston was not given direct notice of said hearings" (*ibid.*). Count II further alleged that the project review conducted by the Northeastern Illinois Planning Commission was invalid because the hearing notice understated the amount of money involved in the acquisition of the property.

Count III (Pet. App. 28a) alleged that, under NEPA, UMTA could not validly provide federal funds for the project without first filing an EIS because such funding would be a major federal action concerning a project that would be "highly detrimental to the environment and public health and safety of the individual plaintiffs and the City of Evanston * * *" (*ibid.*). Count III asserted that UMTA had incorrectly determined that the project was covered by the categorical exclusion set forth in 23 C.F.R. 771.115(b)(25) and, consequently, the agency had wrongly concluded that no EIS was required.

The prayer for relief (Pet. App. 28a-29a) requested the court to enter judgment declaring the Agreement of Sale to be null and void and that PACE and UMTA had acted arbitrarily, unreasonably and against public policy by agreeing to the proposed sale price. Petitioners also requested the court to declare that the failure to prepare an EIS was contrary to law; that "lack of proper notice was given by UMTA and by [the Northeastern Illinois Planning Commission] with respect to [the project review] and

the approval of the grant herein"; and that the location of the proposed facility would be "highly detrimental" to the environment and the public health and safety of respondents. *Ibid.* Finally, petitioners requested the court to enter temporary and permanent injunctive relief barring respondents from proceeding with the proposed action, including the disbursement of federal funds (*ibid.*).

The district court dismissed the complaint on respondents' motions (Pet. App. 12a-13a).[4] The court found that petitioners lacked standing because the complaint failed sufficiently to allege any distinct injury to petitioners from the proposed action. The court also concluded that the federal statutes upon which petitioners' allegations were premised do not create a private right of action.

3. The court of appeals affirmed in a per curiam opinion (Pet. App. 1a-11a). First, the court found (*id.* at 4a-6a) that the UMT Act does not create a private right of action. Second, the court held in any event (*id.* at 11a) that petitioners lacked taxpayer standing to challenge the disbursement of funds by UMTA or PACE. And, third, the court ruled that, due to their failure to allege some distinct injury in fact to their environmental interests, the petitioners "have not sufficiently demonstrated that they have standing under NEPA" (*ibid.*). "It is, of course," the court noted, "not necessary to plead evidence, but in these particular circumstances [petitioners] must provide some sug-

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[4] Petitioners state (Pet. 3, 13) that the district court dismissed the complaint without giving them leave to amend. Nothing in the dismissal order, however, indicated that the court would deny leave to file an amended complaint—the order was simply silent concerning leave to amend (Pet. App. 12a-13a). Rule 15(a), Fed. R. Civ. P., states that leave to amend "should be freely given when justice so requires." Petitioners, however, never attempted or sought leave to amend their complaint, but instead elected to stand on their original complaint and appeal.

gestions that this change causes particular and specific adverse environmental consequences affecting [them]" (*id.* at 10a). The court stated that plaintiffs had failed to allege how the bus garage would be more detrimental to them than the steel business previously on the site. The individual petitioners did not even "allege where they live in relation to the property"; "[n]or do the City and its mayor allege specifically * * * how some conjectured decline in property values and loss of tax revenues, even if considered to be within the zone of protected interests, will result from the change of use" (*id.* at 10a-11a).

ARGUMENT

In order to establish his standing to maintain a suit, a plaintiff must allege, inter alia, "that the challenged action has caused him injury in fact, economic or otherwise." *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150, 152 (1970). The injury alleged must be "distinct and palpable" (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)), and not "abstract" or "conjectural" or "hypothetical." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). A plaintiff cannot obtain standing by asserting some "generalized grievance" against the defendant; rather, he is required to "allege specific, concrete facts demonstrating that the challenged practices harm *him*" (*Warth* v. *Seldin*, 422 U.S. at 508 (emphasis in original)). Such facts must affirmatively appear in the record (*Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986)) and the burden of alleging them rests squarely upon the plaintiff (*Warth* v. *Seldin*, 422 U.S. at 518 ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.")).

The courts below correctly concluded that petitioners had failed to satisify this fundamental requirement. No

important or novel question of standing is posed by the facts of this case. Petitioners' complaint was properly dismissed on a straightforward application of settled principles, and their fact-bound assertion that the complaint did set forth specific allegations of injuries sufficient to meet the requirements of standing does not warrant further review.

a. Count I of the complaint (Pet. App. 27a) alleged that the Agreement of Sale was unreasonable, invalid, and contrary to public policy because PACE had agreed to pay National Steel a purchase price greatly in excess of the fair market value of the tract. The complaint, however, does not specify how petitioners would be injured by the supposedly excessive purchase price, above and beyond their general status as taxpayers. The individual petitioners merely alleged that they are taxpayers (*id.* at 15a), and they "are plainly without standing to sue as taxpayers." *Valley Force Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482 (1982). As for petitioner City of Evanston, the complaint fails to contain any allegation whatsoever that it will be required to bear, directly or indirectly, any portion of the allegedly excessive cost of the land.

Count I also alleged that PACE's Board of Directors had failed to approve the specific amount of the purchase price. But even if we assume that there is some legal requirement that they do so (and no such requirement is stated in the complaint), petitioners have not demonstrated that they have suffered any legally-cognizable injury thereby. The purported injury, if any, would be only to the Board, whose authority was supposedly usurped by its own officers.

b. Count II of the complaint (Pet. App. 27a) alleged that proper notice of public hearings concerning the proposed acquisition was not given and that "the City of Evanston was not given direct notice of said hearings." Nowhere in the complaint or record, however, is there any

indication that respondents breached any legal duty to give such notice or that Evanston and the individual petitioners did not actually receive effective notice of, and have an opportunity to attend, any hearings. Indeed, Paragraph 17 of petitioners' complaint (*id.* at 23a-24a) appears to indicate that petitioners or their representatives did attend the project-review hearing and that "as a result of said hearing, the official project review recommendations of the Northeastern Illinois Planning Commission included the objections to the proposed acquisition and construction of the northshore garage facility * * *."

Count II also alleged that the review conducted by the Northeastern Illinois Planning Commission "was totally invalid in that the notice understated the amount of money involved in the acquisition of the subject property" (Pet. App. 27a). But the record contains no indication that petitioners were in any way injured by this alleged understatement. As we have noted, there is no allegation that petitioners' own funds, other than as general tax revenues, will be used to pay for the project.

c. Count III of the complaint (Pet. App. 28a) alleged that UMTA was required by NEPA to prepare an EIS prior to providing federal funds for the project. The claimed injuries from this purported omission were set out in Paragraph 23 of the complaint (*id.* at 26a-27a) where it was alleged, in conclusory terms, that the project would deprive Evanston and its citizens of tax revenues, that it would be in violation of local zoning, and that it would cause traffic congestion, pollution, noise and other, unspecified, environmental impacts, all leading to lower property values for nearby residential properties.

These generalized allegations are insufficient to establish standing to maintain an action under NEPA.[5]

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[5] Petitioners err in asserting (Pet. 25) that the court of appeals "conceded standing under NEPA," but "then concluded that the allegations of the complaint were insufficient to state a cause of action under NEPA." The court of appeals expressly based the NEPA por-

Pecuniary injuries, such as decreased property values and loss of city tax revenues, are not even "arguably within the zone of interests to be protected or regulated" by NEPA (*Association of Data Processing Service Orgs.*, 397 U.S. at 153). NEPA was enacted to further environmental, not pecuniary, interests. *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1091-1094 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984); 40 C.F.R. 1508.14. Nor is the bare allegation that the proposed project will violate Evanston's zoning ordinance and introduce an inharmonious land use sufficient to carry plaintiffs' burden of alleging specific facts showing a definite, concrete injury to their environmental interests. Petitioners have not alleged any facts that tend specifically to indicate that the proposed use of the tract would have environmental consequences that differ in any significant degree from the prior industrial use of the tract.[6]

Finally, the complaint alleges that the project would cause "congestion, pollution, noise and other adverse environmental impacts" (Pet. App. 27a). But the individual petitioners do not allege that they reside in, or use, the

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tion of its decision upon lack of standing and not upon failure to state a claim. The court concluded that portion of its opinion by stating (Pet. App. 11a (citation omitted)):

> The complaint is framed in general boilerplate language which demonstrates no specific relation of these plaintiffs to this piece of property. Standing is not conferred under NEPA merely because plaintiffs generally disfavor a proposed use of a particular piece of property, if they do not allege some distinct injury in fact to their environmental interests. Plaintiffs have not sufficiently demonstrated that they have standing under NEPA.

[6] As the court of appeals noted (Pet. App. 9a n.2), it was not until after PACE had commenced negotiations with National Steel for purchase of the property that Evanston amended its zoning ordinance to change the use of the property as a bus garage from a permitted use to a special use. The court of appeals concluded that petitioners could not establish standing "regardless of how the zoning ordinance has been manipulated during this controversy" (*id.* at 10a).

area that would purportedly be affected by these environmental impacts. *Sierra Club* v. *Morton*, 405 U.S. 727, 737-741 (1972). And the City of Evanston has not alleged any specific, evidentiary facts tending to indicate how the proposed project would result in any additional evironmental impacts beyond those already present from the existing industrial use of the tract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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